Goh Kang Sia & Anor v Hasiah bte Md Isa

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12–120 OF 2003
KAMALANATHAN RATNAM J
1 SEPTEMBER 2004

Civil Procedure — Jurisdiction — High Court — Whether High Court could review findings of liability when there was no cross–appeal by plaintiff — Courts of Judicature Act 1964 s 33

Tort — Negligence — Contributory negligence — Sessions court judge found deceased 30% liable on basis of damage to deceased's motorcycle and testimony of eyewitness that deceased was speeding — Whether eyewitness competent to assess speed of deceased's motorcycle — Whether deceased contributory negligent

The plaintiff sued the defendants as the mother and dependant of one Zamani bin Hassan ('the deceased'). In her statement of claim, the plaintiff contended that on 2 October 1996 at about 6.15am, as the deceased was proceeding along Jalan Sultan Azlan Shah from the direction of Jalan Tengah towards the direction of Bayan Lepas, the deceased or his motorcycle was collided into by a bus which suddenly and without warning emerged onto the road and into the deceased's path from a factory gate. The gate was on the left of the road as one faced Bayan Lepas. The first defendant was the owner of the bus and the second defendant was the driver. The second defendant testified that he was going to a factory to bring back the workers. To go to this factory, he had to proceed along Jalan Sultan Azlan Shah and then make a 'U' turn. According to the second defendant, he was on the centre lane and since he intended to make a 'U' turn, he moved to the right lane. When he was about 50ft from the place where the 'U' turn was, he gave a right hand signal of his intention to move to the right lane. At the same time, he looked to the rear and noticed a motorcycle light coming from the rear. He then moved slowly to the right and soon after he had moved he heard the sound of a collision coming from the rear. During his examination-in-chief, the second defendant changed his story and said that when he gave his right hand signal he was 300m from the place where the 'U' turn was situated.

The sessions court judge found the second defendant liable but found the deceased contributory to the extent of 30% based on the damage to the motorcycle and on the evidence of the plaintiff's witness ('SP4') that the deceased was speeding. SP4 was the eyewitness to the accident. According to SP4, they were both proceeding along Jalan Sultan Azlan Shah in the direction of Bayan Lepas at the material time. There were three lanes on the said road and SP4 was on the extreme left lane whilst the deceased who was riding ahead of him, was on the centre lane. Suddenly, he noticed a bus emerging from a gate on the left, which was only meant for vehicles entering the premises and not for vehicles to come out onto the main road. The rear

right tyre of the bus encroached into the deceased's path and collided with the deceased's motorcycle.

This was the defendants' appeal against the decision of the sessions court judge.

Held, dismissing the appeal:

(1) Section 33 of the Courts of Judicature Act 1964 ('the Act') provided that 'In the case of any civil proceedings in subordinate court the record of which has been called for, or which otherwise comes to its knowledge, the High Court may give such orders thereon, either by directing a new trial or otherwise, as seems necessary to secure that substantial justice is done'. The operative words 'or which otherwise comes to its knowledge' gave this court the right to review the issue of liability. As such, based on s 33 of the Act, the High Court could, on the available evidence, review the findings of liability even though there had been no cross-appeal by the plaintiff (see paras 22–24).

(2) It was obvious from the evidence of the second defendant that he was prevaricating. Based on the evidence of the independent witness, the bus driver did indeed emerge from the gate. The damage to the bus was over the right rear wheel and not at the rear of the bus, thus indicating that the bus was in an oblique position by cutting across the path of the motorcycle when it collided into the bus. Although the second defendant had said that he would call his employer to testify that he had no business coming out of the gate and that he was in actual fact driving along Jalan Sultan Azlan Shah with the intention of making a 'U' turn some 800ft away, he failed to call this employer and failed to give any reasons for his absence. This was a classic instance to invoke s 114(g) of the Evidence Act 1950 against the defendants (see para 28).

(3) The learned sessions court judge had erred when she held that it was not important for the court to conclude whether the second defendant had emerged from the gate. The session court ought to have made a finding on this issue since this was the crux of the plaintiff's case, which was vehemently denied by the defendants (see para 29).

(4) The eyewitness had testified that the gate was only meant for vehicles and buses to enter into the factory area. Surely the defendants could have subpoenaed the management that controlled the gate to at least testify that vehicles could go in and come out of that gate. This was not done and the only evidence before the court now was that the second defendant had no business coming out of the gate (see para 30).

(5) SP4 said that he was riding his motorcycle at 50 to 60km per hour and that the deceased was riding faster. SP4 was never asked how he was able to assess the deceased's speed. Speed was relative and to some,

even a normal speed would be construed as speeding. Since there was no observance in relation to the deceased's speed, this court cannot hold that the deceased was speeding (see para 32).

(6) Having found the second defendant liable, the next issue to consider was whether the learned sessions court judge was correct in finding the deceased contributory to the extent of 30%. Looking at the damage to the motorcycle, there was nothing to show that the deceased was contributory negligent. The evidence of SP4 that the deceased was speeding cannot be held against the deceased because SP4 was not competent to assess the speed of the deceased's motorcycle. If the deceased was going faster than him, then SP4 could not have been able to keep the deceased within his vision. Having discounted both the reasons given by the session court for finding the deceased as having contributed, the finding of contribution of 30% against the deceased was set aside. Accordingly, the second defendant was 100% liable (see paras 35–38).

[**Bahasa Malaysia summary**

Plaintif telah menyaman defendan-defendan sebagai ibu dan tanggungan Zamani bin Hassan ('si mati'). Dalam pernyataan tuntutan beliau, plaintif berhujah bahawa pada 2 Oktober 1996 lebih kurang 6.15am, tatkala si mati memandu sepanjang Jalan Sultan Azlan Shah dari arah Jalan Tengah ke arah Bayan Lepas, si mati atau motosikal beliau telah berlanggar dengan sebuah bas yang secara tiba-tiba dan tanpa amaran timbul di jalan tersebut dan masuk ke jalan si mati dari pagar kilang. Pagar tersebut terletak di bahagian kiri jalan yang menghadap ke Bayan Lepas. Defendan pertama adalah pemilik bas tersebut dan defendan kedua adalah pemandunya. Defendan kedua telah memberi keterangan bahawa beliau sedang menuju ke sebuah kilang untuk membawa pulang pekerja-pekerja di situ. Untuk ke kilang tersebut, beliau perlu memandu sepanjang Jalan Sultan Azlan Shah dan kemudian membuat satu pusing 'U'. Menurut defendan kedua, beliau berada di tengah lorong dan memandangkan beliau hendak membuat pusingan 'U', beliau telah masuk ke sebelah kanan lorong tersebut. Apabila beliau lebih kurang 50 kaki daripada tempat di mana pusingan 'U' dibuat, beliau memberikan isyarat tangan ke kanan sebagai tanda ingin menukar ke sebelah kanan jalan. Pada masa sama, beliau melihat ke tepi dan menyedari lampu motosikal yang datang dari tepi. Beliau kemudian bergerak perlahan ke kanan dan sejurus selepas beliau bergerak beliau terdengar bunyi satu dentuman dari sebelah tepi. Semasa pemeriksaan utama, defendan kedua telah mengubah cerita beliau dan menyatakan bahawa apabila beliau memberikan isyarat tangan ke kanan beliau berada 300m daripada tempat di mana pusingan 'U' dibuat.

Hakim mahkamah sesyen mendapati bahawa defendan kedua bertanggungjawab tetapi mendapati si mati menyumbang setakat 30% berdasarkan kerosakan motosikal dan atas keterangan saksi plaintif ('SP4') yang mana si mati telah memandu laju. SP4 merupakan saksi utama kepada kemalangan tersebut. Menurut SP4, mereka berdua memandu sepanjang Jalan Sultan Azlan Shah ke arah Bayan Lepas pada masa matan. Terdapat tiga lorong pada jalan tersebut dan SP4 berada di lorong paling kiri sementara si mati sedang memandu di hadapan beliau, berada di lorong tengah. Tiba-tiba, beliau ternampak sebuah bas timbul dari pagar sebelah kiri, yang hanya untuk kenderaan masuk ke premis tersebut dan bukan untuk kenderaan keluar ke jalan utama. Tepi tayar kanan bas memasuki jalan si mati dan berlanggar dengan motosikal si mati.

Ini adalah rayuan defendan terhadap keputusan hakim mahkamah sesyen.

Diputuskan, menolak rayuan tersebut:

(1) Seksyen 33 Akta Mahkamah Kehakiman 1964 ('Akta tersebut') memperuntukkan bahawa 'In the case of any civil proceedings in subordinate court the record of which has been called for, or which otherwise comes to its knowledge, the High Court may give such orders thereon, either by directing a new trial or otherwise, as seems necessary to secure that substantial justice is done'. Perkataan-perkataan operatif 'or which otherwise comes to its knowledge' memberikan mahkamah ini hak untuk mengkaji semula persoalan liabiliti. Oleh itu berdasarkan s 33 Akta tersebut, Mahkamah Tinggi boleh, berdasarkan keterangan yang sedia ada, mengkaji semula penemuan-penemuan liabiliti walaupun tiada rayuan balas oleh plaintif (lihat perenggan 22–24).

(2) Adalah jelas daripada keterangan defendan kedua yang beliau bercakap putar belit. Berdasarkan keterangan saksi berasingan, pemandu bas memang muncul dari pagar tersebut. Kerosakan pada bas adalah pada bahagian tepi tayar kanan dan bukan pada tepi bas, oleh itu menunjukkan bahawa bas tersebut berada dalam kedudukan serong yang menghalang jalan motosikal tersebut apabila ia berlanggar dengan bas itu. Walaupun defendan kedua menyatakan bahawa beliau akan memanggil majikan beliau untuk memberi keterangan bahawa beliau tiada urusan untuk keluar dari pagar tersebut dan bahawa beliau sebenarnya memandu sepanjang Jalan Sultan Azlan Shah dengan tujuan membuat pusingan 'U' lebih kurang 800 kaki dari situ, beliau gagal untuk memanggil majikan tersebut dan gagal memberikan apa-apa alasan untuk ketidakhadiran beliau. Ini adalah contoh klasik untuk menggunakan s 114(g) Akta Keterangan 1950 terhadap defendan-defendan (lihat perenggan 28).

(3) Hakim mahkamah sesyen terkhilaf apabila beliau memutuskan ia tidak penting bagi mahkamah membuat kesimpulan sama ada defendan kedua timbul dari pagar tersebut. Mahkamah sesyen sepatutnya membuat penemuan berdasarkan persoalan ini memandangkan ia adalah pokok persoalan dalam kes plaintif, yang secara bersungguh-sungguh dinafikan oleh defendan-defendan (lihat perenggan 29).

(4) Saksi utama memberi keterangan bahawa pagar tersebut hanya bertujuan untuk kenderaan-kenderaan dan bas-bas untuk memasuki kawasan kilang. Sepatutnya defendan-defendan boleh menyampaikan sepina ke atas pengurusan yang mengawal pagar tersebut untuk sekurang-kurangnya memberi keterangan bahawa kenderaan-kenderaan tersebut boleh masuk dan keluar dari pagar tersebut. Ini tidak dilakukan dan satu-satunya keterangan di hadapan mahkamah sekarang adalah bahawa defendan kedua tiada urusan untuk keluar dari pagar tersebut (lihat perenggan 30).

(5) SP4 menyatakan bahawa beliau sedang menunggang motosikal beliau pada 50 hingga 60km sejam dan bahawa si mati membawa lebih laju. SP4 tidak pernah ditanya bagaimana beliau boleh menaksir kelajuan si mati. Kelajuan adalah relatif dan kepada beberapa orang, kelajuan biasa juga boleh ditafsirkan sebagai membawa dengan laju. Memandangkan tiada pemerhatian berkaitan kelajuan si mati, mahkamah ini tidak boleh memutuskan si mati membawa dengan laju (lihat perenggan 32).

(6) Setelah mendapati defendan kedua bertanggungjawab, persoalan seterusnya adalah untuk menimbangkan sama ada hakim mahkamah sesyen yang bijaksana adalah betul dalam penemuan yang si mati telah menyumbang setakat 30%. Melihat kepada kerosakan motosikal tersebut, tiada apa yang menunjukkan bahawa si mati turut menyumbang dalam kecuaian tersebut. Keterangan SP4 bahawa si mati membawa laju tidak boleh digunakan terhadap si mati kerana SP4 tidak kompeten untuk menaksir kelajuan motosikal si mati. Jika si mati membawa lebih laju daripada beliau, SP4 tidak mungkin dapat melihat si mati. Dengan tidak mengambil kira kedua-dua alasan yang diberikan oleh mahkamah sesyen dengan penemuan yang si mati telah turut menyumbang, penemuan untuk penyumbangan 30% terhadap si mati diketepikan. Sewajarnya, defendan kedua adalah bertanggungjawab 100% (lihat perenggan 35–38).]

Notes

For cases on contributory negligence, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 743–786.

For cases on the jurisdiction of the High Court, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3724–3775.

A **Cases referred to**

Chan Sia Hock v C & C Group Sdn Bhd & Anor [1998] 5 CLJ 123 (refd)
Chu Kim Sing & Anor v Abdul Razak bin Amin [1999] 6 MLJ 433 (refd)

B **Legislation referred to**

Courts of Judicature Act 1964 ss 29, 33, 34, 69(5)
Evidence Act 1950 s 114(g)
Rules of the High Court O 55 r 3

C *AJ Teoh (AJ Teoh & Co) for the appellants/defendants.*
Ramanathan (Ram Pillai & Assoc) for the respondent/plaintiff.

Kamalanathan Ratnam J:

D FACTS

[1] The plaintiff/respondent sued as the mother and dependant of one Zamani bin Hassan, the deceased rider of motorcycle PDH 3209. The first defendant/appellant was the owner and the second defendant/appellant the driver of motor bus PV 8503 at the material time.

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[2] In her statement of claim, the plaintiff contended that on 2 October 1996 at about 6.15am as her son was proceeding along Jalan Sultan Azlan Shah from the direction of Jalan Tengah towards the direction of Bayan Lepas, the deceased or his motorcycle was collided into by the motor bus which suddenly and without warning emerged onto the road and into the deceased's path from a factory gate, leading into the factories situated at FTZ Fasa 1 which said gate was on the left of the road as one faces Bayan Lepas.

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[3] In their defence whilst admitting the collision, the defendants denied all the rest of the allegations. They specifically denied that the bus was driven out of a gate on the left. In their particulars of negligence pleaded against the deceased, the defendants contended that the deceased failed to slow down and or brake upon seen the signal given by the driver of his intention to make a 'U' turn by the side of the road. Another of the particulars was that the deceased failed to brake or stop upon seeing the bus making a 'U' turn. It would be important to remember these two particulars of pleaded negligence as the evidence would subsequently show.

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THE EVIDENCE

[4] The plaintiff called as her witnesses both the Inspector and the Sergeant who investigated this case. The sergeant described the damages to the bus as having occurred just above the right rear tyre whereby the body of the bus was broken. As for the motorcycle, the front left fork was bent and

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the front head lamp was broken. Further the petrol tank and the engine were also broken. He drew the key and sketch and had photographs taken. The sergeant confirmed that from the bus driver's police report he gathered that the driver had stated that he had come from the roundabout at Bayan Baru. He also confirmed that on the left of the road as one faces Bayan Lepas there was a gate leading to the factories at FTZ. In fact, he identified a photograph, out of the many taken, as showing the gate to the factories. He also confirmed that the place where a person could make a 'U' turn was very far from the scene of the accident. If it was close he would have shown it in his sketch plan.

[5] The next witness was SP4. He was the eyewitness to the accident. He testified that he knew the deceased. They both worked in the same factory. That night both he and the deceased worked at the same shift. That morning they were both proceeding along the said road in the direction of Bayan Lepas. There were three lanes on the said road. He was on the extreme left lane whilst the deceased who was riding ahead of him, was on the centre lane. Suddenly he noticed a bus emerging from a gate from the left and encroaching into the deceased's path. It was the rear right tyre that was encroaching into the deceased's path. He noticed the bus emerging from a gate which was only meant for vehicles entering the premises and not meant for vehicles to come out onto the main road. At that moment he was about 60m from the bus. There were street lights on the road at that time and they were on. He even identified through the photographs the gate from which the bus emerged. After the collision he rendered assistance.

[6] He gave a statement to the police about a month later because he did not know that he ought to have lodged a police report. It was the deceased's brother who urged him to give the statement.

[7] Under cross-examination, he confirmed that he had been out at nights with the deceased for meals and that they were close to one another. He felt that the deceased would have been equally anxious as he was to get back home after a long shift and would have been speeding like he was. He reiterated under cross that the gate from which the bus emerged was actually meant for vehicles going in and not meant for vehicles to come onto the road. When it was put to him that that could not have happened because of the security guard at the gate, he said that only at times there was a guard at the gate. This gate was meant as the entrance for all factories at FTZ Fasa 1. At the defence request, he marked as 'Y', the place from where the bus had emerged, and this is shown as a point on the left edge of the road, a short distance from where the bus had finally stopped. The bus crossed from the first lane to the second lane. However when the collision occurred the rear right tyre was encroaching and obstructing the deceased who was then on the third lane. When the wheel so obstructed the path of the motorcycle in an oblique position, the front of the motorcycle collided into the rear right of the

bus near the tyre. He witnessed this collision occurring about 60m in front of him. After the impact, the deceased was flung across the divider and landed onto the other side of the road. It was also ironic that the deceased's brother, who was at that moment travelling from the opposite direction, had to see his brother's body lying on the road.

[8] He denied the defence suggestion that his evidence was merely to support the plaintiff's case since he was a friend of the deceased. He did not know the deceased's brother earlier. The deceased's brother looked for him at his place of work.

[9] He also denied the defence suggestion that the bus could not have emerged from the gate since there was a guard there.

[10] Under re-examination, he confirmed that his speed was 50kmph whilst the deceased was riding faster than him. When the bus encroached, he saw the deceased attempting to swerve to the right to avoid the collision.

[11] The next witness for the plaintiff was the deceased's elder brother. He confirmed that on the eventful day he was proceeding from the opposite direction and on seeing a crowd, he stopped and saw his brother dead on the road. No vehicle wanted to stop to take his brother to the hospital, until a passing lorry took his brother to the hospital and he followed on his motorcycle.

[12] He had never met SP4 before. After the accident, he went to his brother's factory and enquired if there were witnesses since someone on the same shift could have seen the accident. His friends at the factory told him that SP4 had witnessed the accident and that was how he had gone to SP4's house and got him as a witness.

[13] The defendant testified that that morning, he had left his house at Green Lane and was proceeding towards Gelugor by way of Jalan Sultan Azlan Shah with the intention of going to a factory to bring back workers. To go to this factory at Bayan Lepas, he had to proceed along Jalan Sultan Azlan Shah and then make a 'U' turn. He was then on the centre lane and since he intended to make a 'U' turn, he moved to the right lane. When he was about 50ft from the place where the 'U' turn was, he gave a right hand signal of his intention to move to the right lane. At the same time, he looked to the rear. He noticed a motorcycle light coming from the rear. At the next breadth even during his examination in chief, he changed his story and said that when he gave his right hand signal, he was 300m from the place where the 'U' turn was situated. He then moved slowly to the right and soon after he had moved about 10ft, he heard the sound of a collision coming from the rear. When the motorcycle collided into his bus, he was then about 60ft from the place where the 'U' turn was situated. He denied he had emerged from the gate on the left.

[14] Under cross-examination, he named his employer as one Teoh Teik Seng. He noticed the motorcycle coming from the rear some distance away through the mirror on the right, before he moved to the right lane. This distance he estimated at 50–60ft. After the collision, he moved forward to a distance of 20ft before stopping. He had stopped about 60ft from the place where the 'U' turn was situated.

[15] However under further cross-examination, he admitted that the place where he stopped after the collision was in fact about 800ft from the place where the 'U' turn was situated. He also admitted that although he saw the light of the motorcycle on the right lane, yet he moved towards that lane after giving his signal. In the next breadth he said, possibly after realising what he had said, that he did not know if the motorcycle was on the right lane. Then under persistent cross, he again admitted that before the collision the motorcycle was indeed on the right lane. Whilst admitting that there were factories situated along the left side of the , said road he denied emerging from a gate on the left. When he was shown the pleadings in which he had alleged that the collision had occurred when he was making the 'U' turn, he admitted that that was not correct. He clarified by saying that what he had meant was that he had entered into the right lane to make a 'U' turn, about 800ft away from where the 'U' turn was situated.

[16] Under re-examination, he came out with a fresh position of the motorcyclist. This time, he said he saw the motorcycle on the left lane when he was beginning to move to the right lane.

[17] At the close of the defendants' evidence, counsel for the defendants sought an adjournment to have the driver's employer in court to show that he had no reason to come out of the gate on the left as alleged by the plaintiff's witness but that the driver was indeed proceeding to another factory to bring home workers. On the day this case was refixed for hearing, Mr Teoh for the defendants informed the court that the employer was unable to attend as he was unwell. No medical certificate was tendered. The court however adjourned the case for another three months. There were many more postponements for various reasons. The court then fixed a final hearing date. Again, the case was adjourned as counsel for the defendants was at the Alor Setar High Court. Finally after more than a year's adjournment, counsel for the defence closed his case. He gave no reason why he did not wish to call the defendant employer after having the case adjourned for more than a year.

CAN THIS COURT REVIEW THE ISSUE OF LIABILITY

[18] Half way through hearing submissions, I adjourned the case and invited both counsel to address the court as to whether this court could, on the available evidence, review the findings of liability even though there had been no cross-appeal by counsel for the respondents.

[19] Mr Teoh for the appellants referred me to s 34 of the Courts of Judicature Act 1964 which reads as follows:

> 34 No revision at instance of party who could have appealed
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> Where an appeal lies from any decision in any civil matter, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of a party who could have appealed.

[20] He therefore argued that there was no provision for this court to revise, since the respondent who had the opportunity to cross-appeal had failed to do so.

[21] I do not think s 34 is applicable to the present situation. Here the respondent has not sought the revision. If the respondent having missed out on time, then sought to have a second bite at the cherry by seeking a revision, I am of the view, s 34 would apply and preclude the respondent from seeking a revision since she ought to have cross-appealed.

[22] I am of the view that in the present situation where the court on its own initiative had sought to review liability, then the proper section to refer to is s 33 of the Courts of Judicature Act 1964 and it reads as follows:

> 33 Powers of High Court on revision of civil proceedings
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> In the case of any civil proceedings in subordinate court the record of which has been called for, or which otherwise comes to its knowledge, the High Court may give such orders thereon, either by directing a new trial or otherwise, as seems necessary to secure that substantial justice is done.

[23] It is my judgment that the operative words 'or which otherwise comes to its knowledge' give this court the right to review the issue of liability. This court has become otherwise aware of the facts by way of this appeal. The same section also provides that this court can revise if it seems necessary to secure that substantial justice is done.

[24] In *Chan Sia Hock v C & C Group Sdn Bhd & Anor* [1998] 5 CLJ 123, Ian J was of the view that notwithstanding the want of a notice of cross-appeal under O 55 r 3 of the Rules of the High Court 1980, it is nevertheless in the interest of justice, if there is any error in the decision of a lower court, that such error be corrected notwithstanding the failure to give any notice of cross-appeal. This power is derived by the High Court from s 29 of the Courts of Judicature Act 1964 read together with s 69(5) of the said Act. His Lordship then went under s 29 of the Courts of Judicature Act 1964 which reads as follows:

> 29 Civil appeals to be by way of re-hearing
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> All civil appeals from a subordinate court shall be by way of re-hearing, and the High Court shall have the like powers and jurisdiction on the hearing of appeals as the Court of Appeal has on the hearing of appeals from the High Court.

[25] He applied the provision of s 29 together with s 69(5) of the same Act which reads as follows:

69 Hearing of appeals

(5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties, although the respondents or parties have not appealed from or complained of the decision.

[26] In *Chu Kim Sing & Anor v Abdul bin Razak Amin* [1999] 6 MLJ 433, Abdul Malik Ishak J held that the awards for the personal injuries sustained could be increased by the appellate court notwithstanding the fact that the respondent did not cross-appeal with regard to quantum. By challenging the apportionment of liability and quantum decided by the trial court, the appellants had reopened the questions of liability and quantum.

[27] Whilst in neither of the two cases cited, the issue of revision had been raised I am fortified in my view that this court can review any decision since an appeal is indeed by way of a re-hearing. Having decided that I have the power to re-look at the apportionment of liability, I now will look at the available evidence.

FINDINGS OF THIS COURT

[28] It is obvious from the evidence of the bus driver that he was prevaricating. I find from the evidence of the independent witness that the bus driver did indeed emerge from the gate. I come to this conclusion on the following grounds:

(a) it is admitted that there is a gate leading to all the factories on the left side of the said road;

(b) when asked to show his direction on the sketch as he moved to the right lane, the driver drew a dotted arrow at a tangent from the left to the right lane;

(c) the damages to the bus were over the right rear wheel and not at the rear of the bus clearly indicating that the bus was in an oblique position by cutting across the path of the motorcycle when the motorcycle collided into the bus;

(d) having said he would call his employer to court to show that he had no business coming out of the gate and that he was indeed going straight on and then wanting to make a 'U' turn 800ft away, he failed to call this employer and failed to give any reasons for his absence. Surely, this is a classic instance to invoke s 114(g) of the Evidence Act 1950 against the defendants.

[29] The learned sessions court judge erred when she held that it was not important for the court to conclude whether the defendant indeed did emerge from the gate. The lower court ought to have made a finding on this issue since this was the crux of the plaintiff's case and vehemently denied by the defendants.

[30] Having thus satisfied myself that the defendant bus driver did indeed come out of the gate, the next issue is was he allowed to do so. The eye-witness testified that that gate was only meant for vehicles and buses to enter into the FTZ Fasa 1 area where all the factories are situated. The case was adjourned many times during the defence stage. Surely at least in rebuttal, the defendants could have subpoenaed the management that controlled the gate to at least testify that vehicles could go in and come out of that gate. This was not done and the only evidence before me now is that the bus driver had no business coming out of a no-exit gate.

[31] It is important to look into the evidence of the driver. He changed his version so many times as to when he switched lanes. Initially, he said he was 50ft from the place where the 'U' turn was when he gave the right signal and moved to the right lane. Immediately thereafter he said when he gave the signal and turned to the right he was 300m from the 'U' turn because there was a signboard showing 300m. As soon as he had moved for 10ft, he heard the collision. Then he said when the collision occurred, he was 60ft from the 'U' turn. Then under further cross-examination, he said he stopped about 800ft from the 'U' turn after the collision. I must also not forget the pleadings wherein the defendants had averred that the collision occurred when the driver was making a 'U' turn.

[32] It is easy to fathom what really happened. The defendant said that as he moved from the left lane to the right lane, he saw the light of the motorcycle some 50–60ft away and it was on the right lane. Obviously, he must have encroached into the deceased path all of a sudden because according to him as soon as he had moved about 10ft, the collision occurred. The deceased was getting home after a long night shift. Whilst the eye-witness said his speed was 50–60km per hour, he also said the deceased was riding faster. He was never asked how he was able to assess the deceased's speed. Speed is relative. To some even a normal speed, would be construed as speeding. Since there is no observance in relation to the deceased's speed, I cannot hold that the deceased was speeding.

[33] The deceased was on the right lane. Suddenly, this bus driver emerges from the gate and cuts across his path presenting the rear wheel. The motorcycle was then 50–60ft away on the admitted evidence of the bus driver. As soon as he had encroached 10ft into the deceased's path, the front of the motorcycle collided into the rear wheel and the body of the bus, just above the rear wheel.

[34] The bus driver tried to explain his negligence by saying in re-examination that the deceased was on the left lane. Yet he was never asked in re-examination to explain why all along during the examination in chief and during the cross-examination he had said that the deceased was on the right lane.

[35] Having found the defendant bus driver liable, I now have to see if the learned sessions court judge was correct in finding the deceased rider contributory to the extent of 30%. She found, based on the damages to the motorcycle and on the evidence of SP4 that the deceased was speeding, that the deceased had contributed.

[36] Looking at the damages to the motorcycle which I had recorded earlier, there is nothing to show the deceased had contributed. At least, if the defendants had engaged a motor engineer who could testify, by looking at the damages to the motorcycle, as to the speed of the motorcycle at the time of the collision, there would have been a basis for the court to find contribution.

[37] The next issue is the allegation that the deceased was speeding. As I had said earlier, the evidence of SP4 that the deceased was speeding, cannot be held against the deceased because SP4 was not competent to assess the speed of the deceased's motorcycle. If the deceased was going faster than him, then he could not have been able to keep the deceased within his vision. At worst the deceased's speed might have been equal to his. That was why he did not catch up with the deceased but followed him at a distance.

[38] Having discounted both the reasons given by the lower court for finding the deceased as having contributed, I therefore set aside the finding of contribution of 30% against the deceased and hold the defendant driver 100% liable.

[39] In the circumstances, the defendants' appeal against the finding of 70% against them is automatically dismissed. I also award costs to the respondent.

Appeal dismissed.

Reported by Lim Lee Na